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RUDRAPPA GUNASHEKAR and)
JAYASHREE GUNASHEKAR,)
)
Appellants,)
)
vs.) No. 02A03-0712-CV-614
)
KAY GROSE, d/b/a America's Affordable)
Housing J&K Manufacturing,)
)
Appellee.)

August 12, 2008

BAILEY, Judge

Case Summary

Spouses Rudrappa and Jayashree Gunashekar appeal the trial court's denial of their motion to correct error. We reverse and remand.

Issue

The Gunashekars raise seven issues on appeal, one of which we conclude to be dispositive: whether the trial court abused its discretion in denying their pro se motion to continue where their attorney withdrew six weeks before trial.

Facts and Procedural History

In 2002, fire damaged a commercial building (the "Property") owned by the Gunashekars, who were insured by State Auto Property and Casualty Insurance Company ("State Auto"). Rudrappa entered a written contract with Kay Grose d/b/a America's Affordable Housing J&K Manufacturing ("Grose") to perform repairs valued at \$144,337.04 and additional work on the Property valued at \$23,000. In September 2002, State Auto issued a check for \$130,196.70, made payable to Rudrappa and Grose. However, Rudrappa deposited the entire amount in an account with National City Bank. Rudrappa made a partial payment and gave Grose a check that was not honored.

In September 2005, Grose sued the Gunashekars for the unpaid balance and sought treble damages for criminal conversion and deception.¹ She also sued State Auto and National City Bank.

George Martin appeared on behalf of the Gunashekars and filed their answer and

¹ One can obtain treble damages and attorney fees for claims arising from the commission of criminal

counterclaim. On March 12, 2007, Martin represented the Gunashekars at a critical pre-trial conference. That same day, the trial court notified the parties, in writing, of the following:

The deadline for witness and exhibit lists was June 12, 2007;

The deadline for discovery was July 17, 2007;

The bench trial was scheduled for a “first trial setting” on July 31 and August 1, 2007; and

No continuance of any deadline or setting would be permitted.

Appellee’s Appendix at 1-2. On June 5, 2007, Martin filed the Gunashekars’ statement of contentions and their witness and exhibit lists. He also filed a motion for withdrawal of appearance. On June 14, 2007, six weeks before trial, the trial court granted Martin’s motion and notified the Gunashekars that no continuance would be allowed. The Gunashekars filed a pro se motion to continue and asked for “sufficient time to hire counsel prior to the bench trial.” Appellant’s Appendix at 52. The trial court denied their motion.

The bench trial proceeded as scheduled on July 31, 2007. Immediately prior to trial, Rudrappa asserted that he had a brain injury and that he was feeling dizzy and light-headed. Grose’s attorney indicated that he had sent the July 24, 2007 pre-trial order to the Gunashekars three times, but that each was refused. He also said that a process server had attempted unsuccessfully to serve subpoenas on the defendants five times.

When Grose’s first witness, herself, was passed to the Gunashekars for cross-examination, Rudrappa stated, “I am not an attorney. I don’t know what to ask, your Honor. I tried to get an attorney. On the short time, I couldn’t get anybody, so I don’t know what to

conversion and the crime of deception. See Ind. Code §§ 34-24-3-1; 35-43-4-3(a) and 35-43-5-3(a)(6).

ask.” Trial Transcript at 45. Jayashree then said,

I never involved in this. Your Honor, I never involved in any of this. I didn’t make an agreement or anything in paperwork or negotiations. Why my name in this? Why my name is not dismissed? Why I was involved? Nothing is there in my name in this thing. I would like you to dismiss my name.²

Id. at 45-46.

When Rudrappa began to present his own testimony, Grose’s attorney objected and argued that the testimony “disputes the undisputed facts entered by the Court.” Id. at 50. After Rudrappa testified, the trial court asked the Gunashekars if either wanted Jayashree to testify. Rudrappa replied, “I am done, your Honor. I don’t know what to ask of anybody. I am done.” Id. at 84. Finally, the trial court gave the parties ten days to submit proposed findings of fact and conclusions of law. Rudrappa responded, “Since I don’t have an attorney, I don’t know how to do all these things.” Id. at 95.

Ultimately, the trial court found that: the parties agreed that Grose would be paid from the insurance proceeds; Grose was a payee on the check; Rudrappa forged Grose’s signature; and Rudrappa used the funds for his own benefit. It awarded Grose contract damages of \$147,337.04, for which the Gunashekars were jointly and severally responsible. The trial court also entered a judgment against Rudrappa, individually, for treble damages and attorney fees of \$296,520.00 relating to his criminal conduct.

The Gunashekars’ current counsel appeared and filed their motion to correct error. As an attachment, Rudrappa and Jayashree each submitted affidavits stating that they were originally from India, English was not their native language and each had “difficulties

understanding and conversing in English.” Appellant’s App. at 64 and 66. Their motion was denied. They now appeal, filing jointly a Brief of Appellants.

Discussion and Decision

The Gunashekars argue on appeal that the trial court abused its discretion in denying their motion to continue the trial.

There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.

Ungar v. Sarafite, 376 U.S. 575, 589-90 (1964). “Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.” Ind. Trial Rule 53.5.

Upon review of a denial, “the trial court’s decision is given substantial deference and is reviewable only for abuse of discretion.” Elmore v. State, 657 N.E.2d 1216, 1218 (Ind. 1995). There is a strong presumption that the trial court properly exercised its discretion. Id. We will not disturb the trial court’s decision absent a clear demonstration of an abuse of discretion. Id. “An abuse of discretion occurs when the ruling is against the logic and effect of the facts and circumstances before the trial court or when the record demonstrates prejudice resulting from the denial.” Hamilton v. State, 864 N.E.2d 1104, 1109 (Ind. Ct. App. 2007).

The withdrawal of counsel does not entitle a party to an automatic continuance. Id. In reviewing decisions on such motions, Indiana courts have analyzed: whether the withdrawal

² There is no indication in the record that Jayashree filed a motion to dismiss.

occurred at a crucial stage in the proceedings; whether the movant had engaged in dilatory tactics; whether the non-movant would have been prejudiced by a delay; whether new counsel would have had adequate time to prepare for trial taking into account the complexity of the case; whether the attorney's withdrawal was expected or foreseeable; whether the movant was at fault; and what efforts the movant took to secure new counsel. See Hess v. Hess, 679 N.E.2d 153, 154 (Ind. Ct. App. 1997) and Homehealth, Inc. v. Heritage Mut. Ins. Co., 662 N.E.2d 195, 198 (Ind. Ct. App. 1996), trans. denied. This Court has reversed denials where the movant's attorney withdrew respectively four days, five days and two weeks before trial. Hess, 679 N.E.2d at 154-55; Koors v. Great Sw. Fire Ins. Co., 530 N.E.2d 780, 784 (Ind. Ct. App. 1988), abrogated on other grounds by Martin v. Amoco Oil Co., 679 N.E.2d 139, 144 (Ind. Ct. App. 1997), aff'd by Martin v. Amoco Oil Co., 696 N.E.2d 383, 386 (Ind. 1998) and Homehealth, 662 N.E.2d at 199.

In Koors, for example, the summary judgment hearing had already been continued six times. Nevertheless, the Koors Court wrote that “[w]hile the trial court understandably may have been vexed by the numerous continuances of the hearing, the result of the denial of [the] motion for a continuance was to deprive [appellant] of representation at a crucial stage of the proceedings.” Koors, 530 N.E.2d at 783.

Compare Goossens v. Goossens, 829 N.E.2d 36 (Ind. Ct. App. 2005), the sole authority cited by Grose. The Goossens Court concluded that there was no denial of due process where the movant's attorney withdrew fifty days before a dissolution hearing. Id. at 43. However, Goossens addressed the value of a marital estate. The property valuation in Goossens was not as complex as the facts and issues in this case. Furthermore, Goossens

argued on appeal that he was not adequately notified of his counsel's withdrawal, of the dangers of self-representation or that he should seek other counsel. He cited no authority establishing a right to be so informed. Meanwhile, the CCS indicated that Goossens did receive notice of the withdrawal. See also Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, (Ind. Ct. App. 2000) (affirming denial where movant contacted eight attorneys in seven months) and Fetner v. Maury Boyd & Assoc., 563 N.E.2d 1334, 1338 (Ind. Ct. App. 1990) (affirming denial where movant failed to secure trial counsel in fifteen months), trans. denied.

Here, Martin represented the Gunashekars from the filing of their answer through the filing of their final statement of contentions and witness and exhibit lists. Martin participated in the case through the entry of summary judgment for State Auto and the dismissal of National City Bank. Just six weeks before trial, indisputably a critical stage in the proceedings, the Gunashekars had the unhappy choice of proceeding pro se or finding new counsel in a case of some complexity and significant exposure. While a civil matter, Rudrappa's alleged criminal conduct subjected him to treble damages and what resulted in a total judgment of \$443,857.04. Meanwhile, the case required at least some comprehension of insurance proceeds, negotiable instruments, joint and several liability, real estate ownership (whether Jayashree had any duty to Grose), contract compliance, attorney fee damages, civil damages for criminal conduct and preparation for trial.

On appeal, Grose fails to assert that she would have suffered any prejudice from a reasonable delay. While complex, the trial included only three witnesses – Grose, Rudrappa and Jayashree, all of whom were parties. After completing her work, Grose learned in early

2003 of State Auto's payment of insurance proceeds. She then waited two and a half years to file her complaint. She makes no argument that prejudice would have resulted from having the trial fifty-six or fifty-seven months after she completed her work, rather than fifty-four months as occurred here.

Grose's attorney asserted that the Gunashekars avoided receiving service immediately prior to trial. However, the record does not suggest that the Gunashekars engaged in tactics designed to actually delay the trial. They received one enlargement of time for answering the complaint and may have sought the rescheduling of a hearing, neither of which Grose opposed. The motion was the first seeking to continue the trial. While the March 12, 2007 pre-trial order prohibited continuances, it is unlikely that the trial court anticipated that Martin would withdraw three months later.

Finally, the Gunashekars clearly have some command of the English language. Nonetheless, this is not a mechanical test; we must consider all relevant circumstances. See Ungar, 376 U.S. at 589-90. The Gunashekars are not native English speakers and could therefore have some additional difficulty in preparing for trial.

There is little in the record to indicate whether the Gunashekars foresaw Martin's withdrawal, were at fault or were diligent in attempting to secure new counsel. Nevertheless, Martin withdrew six weeks before trial of a complex case with non-native English speakers potentially subject to treble damages. While several relevant concerns suggest that Martin's withdrawal may have compromised the Gunashekars' presentation of their case, nothing indicates that Grose would have been prejudiced by a delay. The trial court abused its discretion in denying the motion to continue. We reverse and remand for a new trial.

Conclusion

The trial court abused its discretion in denying the Gunashekars' pro se motion to continue after their attorney withdrew six weeks prior to trial.

Reversed and remanded.

KIRSCH, J., concurs.

FRIEDLANDER, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

RUDRAPPA GUNASHEKAR and)	
JAYASHREE GUNASHEKAR,)	
)	
Appellants,)	
)	
vs.)	No. 02A03-0712-CV-614
)	
KAY GROSE, d/b/a America's Affordable)	
Housing J&K Manufacturing,)	
)	
Appellee.)	
)	

FRIEDLANDER, Judge, dissenting

I do not agree that the denial of the Gunashekars' motion for continuance constituted an abuse of discretion, and therefore respectfully dissent.

The Majority ably sets out the elements and abuse-of-discretion standard we consider and employ when reviewing the denial of a motion for continuance based upon counsel's withdrawal. In this case, the only grounds upon which we can base a determination that the trial court abused its discretion in denying the motion relates to a combination of three factors: (1) the timing of the request (2) relative to the scheduled date of trial (i.e., six weeks before trial) and (3) the reason for the request (i.e., counsel's withdrawal). That is, following their counsel's withdrawal, the Gunashekars claimed they needed time to retain replacement

counsel, who in turn would need time to familiarize himself or herself with the case before proceeding to trial. Indeed, it seems to me that the Majority's decision to reverse focuses almost exclusively on the short period of time that remained before trial was scheduled to commence when the Gunashekars' counsel withdrew. I believe we are required to look more deeply than that into what occurred in deciding whether the trial court abused its discretion.

I note that the factors to be analyzed, as culled by the Majority from *Hess v. Hess*, 679 N.E.2d 153 (Ind. Ct. App. 1997), include four that might fairly be characterized as containing an element of fault. In addition to considering whether the previous attorney's withdrawal occurred at a critical stage in the proceedings, whether new counsel would have adequate time to prepare for trial, and whether the non-movant would be prejudiced by the delay, we must examine what amounts to the movant's role in having gotten to the point that counsel would withdraw in the first place. As framed in *Hess*, those inquiries include: (1) whether the movant engaged in dilatory tactics, (2) whether the attorney's withdrawal was expected or unforeseeable, (3) what efforts the movant took to secure new counsel, and perhaps most plainly, (4) whether the moving party "is free from fault." *Id.* at 154. So far as I can tell, these four factors are not considered in the Majority's analysis. This omission, if it can be fairly characterized as such, cannot be laid entirely at the feet of my colleagues. The Gunashekars do not explain why their attorney withdrew before trial. Inasmuch as the granting of the motion for continuance was not required, it was incumbent upon the Gunashekars to justify the relief they sought. The trial court's clear, firm, and consistent stance before trial that it would not grant a continuance was no velleity, but a firm statement of purpose. In view of this, I believe the Gunashekars' burden included the burden of

showing they did not in any way precipitate counsel's late withdrawal.

As for the efforts expended to retain replacement counsel in time for trial, again, we are largely in the dark on this matter. I note, however, that the Gunashekars had approximately two months before trial to replace their attorney, but failed to do so. Yet, they managed to retain an attorney within about a week of the commencement against them of the proceedings supplemental. This, among other things, leads me to view with more skepticism than my colleagues the implication that a language barrier may have been at work here.

In the final analysis, the several bases for the Majority's decision to reverse the trial court's determination are all matters that the trial court was in a better position to assess than we are. The trial court was better able to assess the circumstances surrounding the withdrawal of the Gunashekars' counsel, including most notably the Gunashekars' role in it, if any. Also, the trial court would certainly have a much better handle than we do on whether the Gunashekars' command of English was sufficient to permit them to effectively make their case. In deference to the trial court's superior vantage point, I would require more of a showing from the Gunashekars on appeal with respect to the circumstances of counsel's withdrawal and the difficulty their English proficiency presented, if any. Absent that, I cannot conclude the trial court abused its discretion in denying the motion for continuance.